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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 784

FRANCIS RAY ROBINSON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Mathes and Devitt, *Federal Jury Practice and Instructions—Civil and Criminal* 16, n.21

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Francis Ray Robinson, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on September 20, 1966.

OPINIONS BELOW

The judgment of the District Court for the Northern District of Oklahoma (R. 11-12) is not reported. The opinion of the Court of Appeals (*infra,* Appendix A, pp. 1a-9a) is reported at F. 2d .

JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1966, (*infra,* Appendix A, p. 9a). By order of Mr. Justice White, petitioner was granted until November 19, 1966, to file this petition. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. Section 1254(1).

QUESTION PRESENTED

1. Was the instruction given on the issue of entrapment erroneous in that it advised the jury:

(a) that the "law recognizes two kinds of entrapment: unlawful entrapment and lawful entrapment," and stated its advice within that frame of reference;

(b) that the petitioner was not entitled to the defense of entrapment, which had been raised *only* with respect to the sale of *narcotics*— not to the sale of non-narcotics of which the petitioner was also charged, if the jury found that petitioner had a readiness and willingness to sell *non-narcotics?*

2. Did the Court err in failing to acquit petitioner at the close of the Government's case when the undisputed testimony showed, as a matter of law, that (a) the idea of obtaining narcotics for the Government's agents originated with them, and (b) petitioner had no predisposition to sell narcotics?

STATUTES AND RULES INVOLVED

The statutes and rules involved are set out in Appendix D, *infra,* pp. 17a-19a.

STATEMENT OF CASE

Petitioner plead not guilty to a seven-count indictment wherein he was charged with having violated, within the Northern District of Oklahoma, the Federal Food, Drug,

and Cosmetic Act,[1] by having made four sales of habit-forming drugs, and with having violated the Harrison Narcotics Act,[2] by having made one purchase and two sales of narcotic drugs. Three sales of the habit-forming drugs were alleged to have been made on November 13, 1964 (R. 5-7); one sale of a habit-forming drug and one sale of a narcotic drug, on November 24, 1964 (R. 7) (although the evidence established they were several hours apart);[3] and the purchase and sale of a narcotic drug on December 5, 1964 (R. 7-8).

Petitioner was an employed truck driver (R. 85) who was selling pills[4] when he was approached by an Inspector of the Food and Drug Administration who sought to buy narcotics from him.

The initial inquiry about petitioner's ability to obtain narcotics occurred during a meeting of petitioner and two Inspectors of The Food and Drug Administration (Roberts and Beacham, each using an alias) who were conducting an undercover investigation of the sale of pills at a truck stop in Dallas, Texas (R. 17-18). Petitioner, having sold pills to Roberts on October 3, 1964, at the same

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[1] 21 U.S.C. 331(k), 353(b)(1).

[2] 26 U.S.C. 4704(a), 4705(a), 7237(a), 7237(b).

[3] *Infra*, n.9.

[4] Whenever the term, "pills," is used in the text, it shall have reference only to amphetamines or barbiturates which are non-narcotic drugs (R. 260). While they are sometimes referred to as "dangerous drugs" in the testimony, the sale thereof without a prescription is deemed a "misbranding" under Section 353(b)(1)(A) of Title 21, U.S.C., which has reference to "habit-forming" drugs, and is a violation of Section 331(k), the penalty for which is a maximum of $1,000.00 fine or imprisonment for not more than one year or both, Section 333. The penalty for the first offense of selling narcotics under the Harrison Narcotics Act is a minimum of five years and a maximum of 20 years, Title 26, U.S.C. § 4705(a).

truck stop (R. 22, 24-25),[5] had arranged to meet the two Inspectors on October 17, for the purpose of selling more pills.[6] At this meeting, Inspector Beacham inquired if petitioner handled "Black Capsules," a more potent amphetamine product than petitioner was selling (R. 141). Petitioner said that he could obtain them, but did not like to sell or "mess with" them because "they would hurt your kidneys" and that he "didn't like to sell anything that would hurt anyone" (R. 160). Beacham testified that, later in their conversation:

> "* * * I asked him the question if he could get us any hard stuff, meaning narcotics. At this time Ray Robinson stated that he had, on one occasion, at one time, gotten a person 25—well, let's see, What was the name of it. Well, 25 narcotic tablets. They were morphine tablets is correct on that. I couldn't think of it. Morphine tablets. He said that his brother had learned that he had sold these to this particular person and his brother stated he was an addict, and he discouraged him from selling anymore to this person, and I said, 'Well, can you get them. If you can get them, I can sell them in Waco. I know a number of people down there and in particular, a negro person who would like to handle a lot of those and I could make some money.' Well, he said he would check and find out. Now, at this point, Ray Robinson—we started discussing pills again * * *" (R. 160-161)

---

[5] Petitioner's motion for a mistrial on the ground that the sales of pills to Roberts in *Texas* were outside the indictment was denied and the evidence admitted on the ground of "scheme and pattern;" counsel claimed surprise at this theory, urging that sales of pills were in no way connected with the sale of narcotics and "this testimony would prejudice him with respect to Counts Five, Six and Seven (narcotics)," but the Court nevertheless admitted the evidence for that purpose (R. 22-24).

[6] Roberts called petitioner on October 10, 14, 15, and 16 (R. 26) Beacham, on October 15 (R. 158).

Petitioner sold each of the inspectors a quantity of pills that day (R. 29).

Thereafter, Roberts called petitioner on October 28, from California (where he was attending The Narcotics Training School) and asked if petitioner had any morphine tablets. Petitioner said he had "access to them" but "would have to check and see" about the price (R. 31).

On November 13, Roberts and Beacham were in Tulsa, Oklahoma, at petitioner's home (a trailer house on the outskirts of Tulsa) in response to his call of November 11, to Roberts that he had the "merchandise." After agreeing to buy "500 tuinal, 500 seconal, and 100 green and clear capsules" for which he paid $50, $45, and $10, respectively,[7] Roberts inquired if petitioner "had been able to obtain" the morphine tablets. Petitioner said he "thought he could get some in two or three days," and Roberts said he would check back (R. 171, 44).

Between the 13th and the 18th of November, Roberts again called to inquire about petitioner obtaining morphine tablets:

> "I asked him about the morphine tablets, whether he had them. He said he talked to his man and that he was—you know, *if* he was going to handle them he was going to handle them in a large quantity at one time, and so I told him I could handle *1,000* of them if the price was right, and I asked him what *1,000* of them would cost, and he said *1,000* of them would cost me $550. He told me that he would have them—probably obtain them in the next day. I promised him I would call him on the following day" (R. 45, emphasis supplied).

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[7] There were no narcotics in the "merchandise" Roberts had come to Tulsa to purchase: These are the sales charged in Counts 1, 2 and 3, respectively, of the indictment.

Roberts called again on the 18th to ask if petitioner had the 1,000 morphine tablets. Petitioner did not.[8] Roberts said that his "boy in San Antonio" "wanted a *sample* before he bought a large quantity." Petitioner said he could get him a "sample of *ten* or *twelve*" (R. 46, emphasis supplied).

On the 23rd, Roberts again called petitioner to ask if he "had my morphine tablets." Petitioner said he did, and Roberts said he would pick them up the next day (R. 47). Roberts arranged to have James Rose, a Bureau of Narcotics Agent, accompany him to Tulsa. They arrived at petitioner's home about 4:40 p.m., and Rose was introduced as "Jim Adams," "my boy from San Antonio who handled the hard stuff" (R. 47).

Rose told petitioner he dealt only in large quantities. Petitioner, according to Rose, stated he could get *5,000* morphine tablets in one bottle from his source, who was a legitimate dealer in narcotics, but that his source "is low on narcotics, but he hopes to have some before too long" (R. 193). Rose asked what petitioner had on hand. Petitioner got a bottle of 100 morphine tablets from his truck, but said "he could only sell us a few tablets at this time as he had promised the person he got it from that he was going to let somebody have a few tablets for samples at this time just to see if they were good" (R. 193). Rose told petitioner he, "couldn't buy 10 or 12 tablets, that I had to make more money than that, I couldn't deal in that small quantity, that I would take the whole bottle *if* he

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[8] According to Roberts, petitioner said that, when Roberts had not called him back the next day as he promised, he sold them to a "fellow in Kansas City" (R. 46). On two other occasions, petitioner, who had Roberts telephone number in Waco, had called him when he wanted to sell him pills (R. 21, 31). At $550.00 a thousand, it would seem that petitioner had greater incentive to call than he did on November 11, as the "merchandise" Roberts bought in response thereto sold for only $105.00.

could sell them" (R. 194, emphasis supplied). Petitioner replied that

> "he couldn't without checking with his source, and I suggested that he do so. He went to the phone and called someone whom he called Charlie and they talked price. * * * I could overhear the conversation of both persons. The phone was turned up very loud and I heard them discussing the price. I heard the other person say he wouldn't take less than 100 and a quarter for the bottle, and Ray, the defendant, told me that, 'I would have to have a 100 and a quarter.' I argued with him some and told him—*motioned* that I would give him $100 for the bottle and after some argument we[9] agreed on the price and he brought the bottle back over and set it down on the table." (R. 194, emphasis supplied).

After being given the $100.00,[10] petitioner told Rose and Roberts

> "that he was very much aware that this was a dangerous—this was a dangerous job, dealing in narcotics and he told me that he was making a lot of money *in the pill traffic* and he suggested that I, along with my narcotic activities, join him and sell pills for him, to my customers, and *try to get them over on pills rather than narcotics.* He told me also that in Tulsa you *could deal in pills with no danger,* said he had an attorney that could get him off with no problem, could get him off just like that with no time, dealing in pills, *'and this,*—and he picked up the bottle and said *'is a*

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[9] The term, "we," was made perfectly clear on cross-examination:

> "Q. I believe you said that his source of supply said he would not take under $100? That he would sell them for $100, is that right? A. I believe he first said he would take $125 and then he came down. Yes.
>
> Q. Came down to $100, and that is what he would take for this—these pills in this exhibit? A. Yes.
>
> Q. How much did you pay for them? A. $100" (R. 224).

[10] This is the transaction that is the subject of Count 5 of the indictment—"*Robinson* did *sell* to James A. Rose."

dangerous thing. Not too long ago they gave a man *50* years in Tulsa for selling those'." (R. 195, 49).

Rose then told petitioner he wanted to purchase some heroin, "if he knew where some was in Tulsa." He also asked if petitioner could get him any dilaudid or demerol. Petitioner said "he knew some drug store burglars and that he would see what he could do." The three of them set off in petitioner's truck to see if they could find any of these narcotics[11] (R. 198). They first drove to an apartment over a drug store and then to a filling station where petitioner talked with James Hitchcock. He reported back that Hitchcock "thought he could take care of us, *or take care of Jim* [Rose], and would meet them at petitioner's home at 8:30 p.m." (R. 50, 198, emphasis supplied).[12]

Hitchcock arrived at 8:30 p.m. and, after being introduced to the agents, was ask by Rose if he could try to

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[11] Illustrative of the pursuit of Rose and Roberts to get petitioner to locate narcotics for them are the following colloquies on cross-examination of Rose:

> Q. • • • You and Mr. Roberts, as a part of your scheme to try and buy narcotics from Ray, had him out looking all over to see if he could find narcotics for you, didn't you? • • • A. Yes. We have to look hard for them. Yes.
>
> Q. You had Ray looking hard for it for you, didn't you? A. We had him looking for it, Yes." (R. 224)
>
> • • •
>
> A. • • • We looked around and checked two or three houses. • • •
>
> Q. For what purpose? A. They were supposed to be dope peddlers *and Ray was going to help us find them.*
>
> Q. You had Ray out rustling around to see if he could find you some dope, is that right? A. We were with him, yes. (R. 233, emphasis supplied)

Other examples are found at R. 122, 129, 134, 226, and 229.

[12] Petitioner then took them to a club so they could see what the "pills are selling for in this town." (R. 51).

get some dilaudid (R. 52, 198). Hitchcock called a person named "Tommy;" relayed to Rose that "Tommy had 22 dilaudid tablets that he would sell, for I believe, $2 apiece." Rose said that the price was too high, that he was interested strictly in wholesale dealing, to tell Tommy that "I would talk to him on his complete stash if he would talk that way, to check his supply and I would buy the whole stash" (R. 198-199); to tell him to make an inventory and to call back and they "would quote him a definite price on it" (R. 52). Hitchcock concluded the call, said Tommy would check his supply and call back. When he did not call, Rose had Hitchcock call several more times, but to no avail (R. 199).

Rose and Roberts left about 10:00 p.m., but "before we left * * * he [petitioner] *pressed* Inspector Roberts to buy some *pills*," which Roberts finally did for $10.00 (R. 198, 52, emphasis supplied).[13]

On November 30, Roberts and Rose again visited petitioner, who said he "hadn't been able to do any good so far" on the *5,000* morphine tablets Rose had requested on his prior visit. Rose asked him to check again; petitioner called a number and told Rose "he would know something definitely tomorrow at noon" (R. 201). Rose then asked him "how he was doing on the stash of narcotics from Tommy?"; petitioner told him Tommy had been caught and shot in a burglary, was under guard in a hospital, and he said "he would try to get in touch with his wife and maybe get the narcotics." (R. 202). Following this conversation, petitioner then took the agents out looking for dilaudid a second time, but was unable to find anything for them (R. 54, 202).

The agents returned the next day, December 1, about noon, were told by petitioner that he had not been able to

[13] The sale of the pills is the subject of Count 4 of the indictment. It occurred approximately five hours after the transaction relating to the morphine tablets.

get the *5,000* morphine tablets (R. 54, 204).[14] Petitioner said "he thought he knew where Agent Rose could purchase some morphine and dilaudid" (R. 57), and, for the third time, petitioner drove them around to various places trying to find narcotics, but none were found (R. 57, 205).

On December 4, Roberts called petitioner from Dallas in response to petitioner's efforts to reach him at his home in Waco (R. 58, 142). Petitioner told Roberts that he had "morphine, dilaudid, opium and various other narcotics." Roberts said he would be up the next day (R. 58). Roberts called the Bureau of Narcotics at Oklahoma City (R. 58). Rose called petitioner that night and was told by petitioner that he "had some stuff that the boy we had talked about, Tommy Anthamatten, the one that was shot in the burglary, that his wife had arranged to get the narcotics from Tommy Anthamatten's wife, and he had them for sale." Petitioner said there were "two sacks" which contained "opium, dilaudid, morphine, codeine * * * and a number of other things" (R. 205-206).

Rose, unaccompanied, went to petitioner's home the next day and was shown the two sacks (R. 206) which contained a conglomeration of items—"[m]ost of it is not considered good narcotics to the addict," "[m]ixed barbituates and everything else, some of it 'was a bunch of junk'" (R. 239). Rose testified that petitioner told him that he "had arranged to get them from this burglar, Tommy Anthamatten, *for me* [Rose]" (R. 238, emphasis supplied). Petitioner said he "wanted $150.00 for the whole box of narcotics;" he held up a bottle which he said was morphine but which was, in fact, codeine (R. 207-208). Rose wanted

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[14] Petitioner, however, opened his refrigerator door and showed Roberts a "number of amphetamines and barbiturate pills" (R. 55, 204). He sold Roberts a bottle of belladona for $10.00 and a bottle of methamphetamine for $8.00. Roberts testified that it was not necessary for a seller of methamphetamine to be presented with a prescription and he was not sure about belladona (R. 62).

to buy some but not all of what was in the two sacks, but "did eventually buy all" (R. 208), "[b]ecause he only—he wanted to sell the whole package"[15] (R. 239). Rose paid $150.00 for the lot[16] (R. 237).

Between that date, December 5, 1964, and February 17, 1965, Rose and Roberts continued their efforts to obtain the *5,000* morphine tablets,[17] as well as other drugs and extremely large quantities of pills: Rose met petitioner at his home on January 26, 1965, and was told by him that he "hadn't been able to do any good, the man still couldn't come up with that many" (R. 218);[18] Roberts called five times and saw petitioner once in efforts to buy either or both narcotics or extremely large quantities of pills (R. 135, 58-62). *Despite these efforts, no other transactions occurred.*

At the conclusion of Robert's testimony, counsel for petitioner unsuccessfully sought a mistrial, prayed that Government dismiss Counts 5, 6, and 7 (narcotics charges) or elect (R. 151, 153). The basis of the relief was that it

[15] A detailed description of the varied items in the sacks, which were introduced individually as Exhibits 22-49, is found at R. 209-215 and R. 257-261. This is the "stash" that Rose asked petitioner to get for him from Tommy (R. 199, 202, 235-236).

[16] This is the transaction that is the subject of Counts Six and Seven (purchasing and selling of codeine).

[17] Rose originally sought to have petitioner obtain such a quantity on November 24.

[18] Over objection, Rose testified that, on January 26, 1965, while he was at petitioner's house, petitioner's "phone was continually busy;" that he accompanied petitioner while he delivered "a dozen Valo inhalers" and petitioner told him how profitable that business was; that petitioner also delivered pills to a truck driver and that petitioner told him that he could make $700 a week on pills (R. 217-218). Rose then testified that, on November 30, petitioner had told him "that he had made a lot of money in the pill traffic and that he had recently bought him a nice piece of land, and he was planning on building a home and he was going to get out of the business except on a large wholesale level" (R. 218).

was "a midjoiner of counts under this theory of Government:"

> "It is impossible for this defendant to defend the Fifth, Sixth and Seventh Counts of the indictment under the theory of the Government [that] by proving offenses under the Pure Food Act and alleging that they establish a pattern and design for Counts Five, Six, and Seven, and you cannot differentiate them under the charge of the indictment as it is drawn."

At the conclusion of the Government's case, the Court admitted all of the exhibits offered by the Government, including the pills which had been purchased by Roberts and Beacham in Dallas, Texas.

Counsel for petitioner then moved to dismiss Counts 5, 6, and 7 because the evidence reflected a "misjoinder" of counts and that to permit the jury to consider those counts would deprive him of "his rights of due process." Petitioner further moved that each of the counts of the indictment be dismissed on the basis of entrapment. The motions were denied (R. 272).

Petitioner's case consisted of the testimony of his wife (R. 286-294) and Hitchcock (R. 274-286).

At the conclusion of petitioner's case, counsel moved, with respect to Counts 5, 6, and 7 only, that they be dismissed on the ground that the evidence, as a matter of law, established he had been entrapped as to the crimes alleged in those counts, but this was denied (R. 295).

The instruction concerning the evidence of the sales of pills in Texas advised the jury that a sale of a pill was a like or similar transaction to the sale of a narcotic. It permitted such evidence to be considered as to petitioner's state of mind, if they found he did the acts charged. It also stated that such evidence was admitted to show that the "alleged earlier offense was part of a pattern, or course of conduct, which had been followed during other periods." (Appendix C, p. 16a).

Counsel objected that the instruction "is definitely directed to acts not comparable to the offenses charged in Counts Five, Six and Seven" (R. 307).

The Court's instruction on the defense of entrapment followed immediately after its instruction on the Texas offenses. The Court said:

> "The accused offers the defense of *unlawful* entrapment as to the crime charged in the indictment.
>
> "The law recognizes *two* kinds of *entrapment; unlawful entrapment* and *lawful entrapment.* Where a person has no previous intent to *violate the law,* but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of *unlawful* entrapment, because the law, as a matter of policy, forbids a conviction in such a case.
>
> "On the other hand, where a person already has the readiness and willingness to *break the law,* the mere fact that Government Agents provide what appears to be a favorable grounds for believing that a person is engaged in the illicit sale of narcotics, it is not *unlawful* entrapment for a Government Agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.
>
> "If, then, the Jury should find that beyond a reasonable doubt from the evidence in the case, that before anything at all occurred respecting the alleged offense involved in this case, *the accused was ready and willing to commit crimes, such as charged in the indictment,* whenever opportunity was offered, and that the Government Agents did no more than offer the opportunity, the accused is not entitled to the defense of *unlawful* entrapment.
>
> "On the other hand, if the Jury should find from the evidence in the case that *the accused had no previous intent or purpose to commit any offense of the character here charged,* and did so only because he was induced or persuaded by some agent of the Government then the defense of *unlawful* entrapment is a good defense, and the Jury should acquit the accused." (R. 301-302, emphasis supplied)

Counsel objected to this instruction and offered one which the Court refused to give (R. 10, 307). The tendered instruction did not use the terms "unlawful entrapment" and "lawful entrapment," it did limit the defense of entrapment to Counts 5, 6 and 7 only, and it did state the question of inducement and predisposition with reference to those particular crimes (R. 10, Appendix B, p. 11a).

During its deliberations, which had begun at 5:40 p.m. on May 19, the jury asked for, and heard, the "[D]irect testimony on the 100 morphine tablets Agent Rose purchased from Ray Robinson on 11-24-64, Number Five." The jury also asked for, and received, the written instruction on entrapment (R. 308-311)

At 2:05 p.m. of May 20, the jury reported it had not been able to reach agreement. The foreman wanted to state "what the objection" was, but the Court declined to hear it and, instead, gave the so-called "Allen" charge over petitioner's objection (R. 312-314). The jury returned its verdict of guilty on all counts at 2:25 p.m. (R. 314).

A motion for new trial urging the objections previously made was denied (R. 12-14), and the Court imposed sentences of one year on each of the misdemeanor counts, *fifteen* years on Count Five and on Count Seven, and placed petitioner on probation on Count Six for five years; all sentences to run concurrently, except the period of probation to commence at the expiration of sentence in the other counts (R. 11-12).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I

The decision of the Court below, approving the instruction given on the defense of entrapment, is in direct conflict with decisions of the Second Circuit and with the District of Columbia Circuit.

1. The Tenth Circuit's approval of the instruction, which used the terms, "unlawful entrapment" and "lawful

entrapment," is in direct conflict with the decision of the Second Circuit in *Pugliese* v. *United States*, 346 F. 2d 861 (C.A. 2, 1965), wherein that Court specifically rejected an instruction which used those terms.

a. The instruction given by the trial court in the instant case advised the jury that the defendant had raised the defense of "unlawful entrapment." It then advised the jury that "[T]he law recognized two kinds of entrapment: lawful entrapment and unlawful entrapment." It advised that "unlawful entrapment was a good defense under stated circumstances and not under other stated circumstances.[19] This instruction was approved by the Court below (Appendix A, pp. 5a-6a.).

In rejecting an instruction which used those terms and which was, in other aspects, practically identical to the one given in the instant case, the Second Circuit, in the *Pugliese* case, *supra*, stated:

> "Semanticists might favor this distinction between 'lawful' and 'unlawful' entrapment. See Williams, Criminal Law § 256, at 785 (2 ed. 1961). According to current usage, however, what the trial judge referred to as 'lawful' entrapment is not entrapment at all. See Sherman v. United States, 356 U.S. 369, 372 * * *. *To depart from this usage is to invite needless confusion.*" (P. 865-866, emphasis supplied)[20]

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[19] The complete instruction is set forth at p. 13, *supra*.

[20] Although the Court reversed the lower court on other grounds, the proscription of that instruction for future use by the trial courts in its circuit was made clear, and the Court's statement with respect thereto is tantamount to a holding thereon: "In view of this conclusion (on a different point), we need not decide whether * * * the trial judge committed other reversible error under Fed. R. Crim., p. 52(b). Nevertheless inasmuch as two of defendant's points are likely to arise again in the course of a retrial, we think it advisable to express our opinion on them so as to guide the district court in any further proceedings that may be had" (P. 864).

The subject instruction is, indeed, confusing,[21] if for no reason other than that it casts upon a jury the task of determining a line of demarcation that does not legally exist: Nowhere in the *Sorrells, Sherman, Masciale* and *Lopez*[22] cases is there to be found any suggestion that this Court "recognizes two kinds of entrapment: unlawful entrapment and lawful entrapment."

b. The importance of resolving this conflict between Circuits (and to correct what we respectfully submit is an erroneous instruction) is not to be weighed only in the light of the prejudicial effect thereof upon this petitioner. The necessity for resolution is accentuated by the fact that the terms, "unlawful entrapment" and "lawful entrapment" are employed in the recommended instructions on entrapment which appear in *Federal Jury Practice and Instructions—Civil and Criminal,* Mathes and Devitt (West Pub. Co., 1965), and in the *Manual on Uniform Instructions In Federal Criminal Cases*[23] (Appendix B, p. 14a and p. 15a, respectively), whereas, the instruction on entrapment in another manual, *Criminal Jury Instructions for*

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[21] The jury was obviously confused about the question of entrapment, for it requested that the Court's instruction thereon be given them in written form (R. 310-311).

[22] *Sorrells* v. *United States,* 287 U.S. 435; *Sherman* v. *United States,* 356 U.S. 369; *Masciale* v. *United States,* 356 U.S. 386; *Lopez* v. *United States,* 373 U.S. 427.

[23] A manual prepared by a committee appointed by Chief Judge Hastings, Seventh Circuit, and recommended for use by the Chief Judge in a message to the Judicial Conference of the Seventh Federal Circuit, dated November 8, 1963. 33 F.R.D. 526. By an amendment to Rule 7 of the general Criminal Rules of the U.S. District Court for the Northern District of Illinois, dated November 8, 1963, it was provided that instructions in the Manual "shall be considered * * * by the Court in preparing instructions of a general nature." 33 F.R.D. 529.

the District of Columbia,[24] does not use those terms. Because of the differences in these manuals and their use in the various Circuits, uniformity among the Circuits on this important phase of defense will be achieved only by this Court's pronouncement thereon.

2. The Tenth Circuit's approval of the instruction given, insofar as it directed the jury to reject petitioner's defense of entrapment—which had been urged *only* with respect to the narcotics charges—if it found that petitioner had a willingness to sell *either* pills or narcotics, is in direct conflict with the decision of the District of Columbia Circuit in *Hansford* v. *United States*, 303 F. 2d 219, 112 U.S. App. D.C. 359 (1962), wherein that Court interpreted the word, "innocent," which appears in *Sorrells* v. *United States*, *supra*, and in *Sherman* v. *United States*, *supra*, to mean that an accused's predisposition to commit other crimes is merely *relevant* to—but not *dispositive* of—the question of the accused's predisposition to commit the particular crime to which he had raised the defense of entrapment.

In the *Hansford* case, which involved the sale of narcotics, the instruction provided, *inter alia*,

> "'* * * you have got to consider [Hansford's] background, the whole of it, in determining whether he was an *innocent* man who wouldn't have made that sale but for being seduced into it.'" (P. 221, emphasis supplied)

Counsel objected thereto on the ground that, because of Hansford's criminal record, the use of the word "innocent" could lead the jury to believe that the defense of entrapment was not available to him. He urged the judge to advise the jury that it meant "innocent of this one particular charge." The instruction was not amended.

On appeal, the Court reversed, finding that the jury could have believed that the word, "innocent" meant a person who had "no criminal record." (P. 222) The

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[24] Prepared and published by The Junior Bar Section of The Bar Association of the District of Columbia (1966). (Appendix B, pp. 12a-13a)

Court stated that the Supreme Court, in both the *Sorrells* and *Sherman* cases,

> "evidently meant by 'innocent,' in connection with entrapment, *absence of a predisposition or state of mind* which readily responds to the opportunity furnished by the officer or his agent *to commit the forbidden act for which the accused is charged.*" (P. 222, emphasis supplied)

The Court's holding was:

> "But readiness or predisposition is not established by evidence that a person is not innocent in that he has a criminal record. Innocent in the context of entrapment means that the defendant would not have perpetrated *the crime for which he is presently charged* but for the enticement of the police official. The defendant, in such circumstances, must be considered a previously innocent person. A criminal record is *relevant* in regard to a predisposition or propensity, *but does not preclude* the defense of entrapment." (P. 222, emphasis supplied)

Thus, the District of Columbia Circuit holds (and, we submit, correctly) that, while evidence of other criminal activity is *relevant* to, it is not *dispositive* of, the issue of an accused's predisposition to commit the offense to which he claims entrapment.

In the instant case, petitioner was charged both with selling pills and with selling narcotics. He raised the defense of entrapment *only* to the narcotics charges (R. 10,295,310). The evidence clearly established that petitioner was "ready and willing" to sell pills, but the court, however, did not limit the jury's consideration of that evidence merely to "bearing upon" the question of petitioner's predisposition to sell narcotics. Instead, it instructed the jury that, if it found that petitioner "was

ready and willing to commit *crimes,* such as charged in the indictment,"[25] he was not entitled to the defense of entrapment. Thus, the Court made the evidence of petitioner's willingness to sell pills *dispositive* of the issue of petitioner's predisposition to sell narcotics—not merely *relevant* thereto. It is, accordingly, in direct conflict with the *Hansford* interpretation of this Court's decisions on the subject of entrapment.

Nor can the Government be heard to assert that the instruction was justified in the setting of the instant case and thus claim there is no conflict between the Circuits. The instruction was plainly erroneous: willingness to sell pills cannot be equated with willingness to sell narcotics, for the offenses are not comparable. They are not the product of the same statute: the sale of pills is prohibited by one; the sale of narcotics, another. One is a misdemeanor; the other, a felony. The penalty for one is a maximum of one year; for the other, *a minimum of five years and a maximum of twenty.* The enforcement of the respective statutes is conducted by different agencies.

But perhaps the most important difference between the two offenses—insofar as predisposition to commit the two —rests, however, not in the foregoing, but in the fact that the natural abhorance of people to the use of narcotics, born of the historical association of narcotics and depravity, does not exist with respect to the use of pills. In speaking on the question of whether "dangerous drugs" should be placed under narcotic-like restrictions,[26] Carl J. De Baggio, Chief Counsel, U. S. Bureau of Narcotics, stated:

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[25] This same advice was also stated in different form in the instruction " * * * if the jury should find * * * that the accused had no previous intent to commit *any* offense of the character *here charged* * * * " the jury should acquit the petitioner (R. 302).

[26] Panel discussion on "Non-Narcotic Drug Abuse," Fifth Annual Conference of the International Narcotic Enforcement Officers Association, Inc. held October 13, 1964.

"In some ways I think the term 'dangerous drugs' as applied to barbiturates and amphetamines (and, of course, numerous other drugs) is unfortunate. True, they can be harmful to persons who take them without proper medical direction. But are they as dangerous as the opiates, the narcotic drugs? Do they cause the enslavement and debauchment associated with narcotic addiction? I have seen no such evidence.

* * * *

"Some feel that over the years there has developed an acceptance of the most restrictive type of controls for narcotic drugs because of strong public disapproval of drug addiction. *That same public disapproval does not seem to be so strong when dangerous drugs are involved. Therefore, without strong public acceptance for treating them alike,* there could well develop a weaker enforcement with reference to narcotic drugs.[27]

We submit that evidence of a predisposition to sell pills cannot be equated with predisposition to sell narcotics and, thus, it was prejudicial error for the court to have so instructed the jury.[28]

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[27] Pamphlet, entitled, *Non-Narcotic Drug Abuse,* prepared and distributed by Smith Kline & French Laboratories (1964, pp. 15, 16, emphasis supplied).

[28] Indeed, the *admissibility* of such evidence as being *relevant* to predisposition to sell narcotics is quite doubtful. Cf. *Enriquez* v. *United States,* 314 F. 2d 703, 714-717 (C.A. 9, 1963) (conviction of selling narcotics reversed, defendant's *use* of marijuana had been admitted to show predisposition to *sell* narcotics; *United States* v. *Owens,* 228 F. Supp. 300, 304 (U.S.D.C., D.C., 1964) (motion for acquittal granted, association with users and sellers of narcotics not sufficient to show predisposition to *sell* narcotics); *State* v. *Hunt,* 91 Ariz. 145, 370 P.2d 677 (1962) (conviction of marijuana violation reversed, defendant's use and dealing in heroin admitted). If, as we suggest, such evidence was not even *relevant* to the issue of predisposition to sell narcotics, the prejudicial effect thereof on petitioner's defense of the entrapment to the narcotics charges required the court to grant him, under Rule 14, relief which he had sought (R. 22-24, 151-153, 269-270, 272, 295-296). *Drew* v. *United States,* 331 F. 2d 85, 118 U.S. App. D.C. 11 (1964).

We respectfully urge that the instruction given was prejudicially erroneous, that a conflict of Circuits has been established and pray that this Court grant this petition in order to correct the decision below and to announce for all Circuits the correct instruction on entrapment.[29]

II

The failure of the Court below to reverse the trial court's refusal to grant, as a matter of law, a judgment of acquittal on the narcotics counts on the ground of entrapment, is in conflict with the decisions of this Court in the *Sorrells, Sherman* and *Masciale* cases, *supra.*

If the "undisputed testimony of the prosecution witnesses" establishes that an accused is entrapped, the Court must, as a matter of law, find the accused not guilty. *Sherman* v. *United States, supra,* at 373.

The defense of entrapment is available to an accused:

> "* * * when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 287 U.S., at 442.

We submit that, upon the testimony of the Government's witnesses, the trial court was required to find for the petitioner as a matter of law.

It is undisputed that the evidence established that the idea of purchasing narcotics from, *or through,* petitioner was initiated by Inspector Beacham (R. 160-161). The question then[30] is whether the evidence showed that, at the time of Beacham's suggestion, petitioner had a "readiness or willingness"—a predisposition—to sell narcotics. We

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[29] The *Hansford* interpretation is embodied in the instruction on entrapment which is in the manual, *Criminal Jury Instructions for the District of Columbia;* the instructions in the two other manuals heretofore referred to (p. 16, *supra*) each use such terms as, "no previous disposition to break *the* law" and "already has the readiness and willingness to break *the* law."

[30] Lopez v. United States, *supra,* at pp. 434-435.

submit the evidence showed he did not have such predisposition.

Petitioner's reaction to Beacham's initial inquiry of October 17, 1964, asking if petitioner could get him narcotics—"he would check and find out"—must be evaluated in the light of their conversation that night:[31]

Petitioner and Beacham were discussing pills; petitioner was unwilling to sell Beacham a stronger amphetamine pill (Black Capsules) than he normally sold because they "would hurt a person's kidneys" and he "did not like to sell anything that would hurt anyone." When Beacham's inquiry about narcotics was made, petitioner said that he had, "on one occasion, at one time," gotten twenty-five morphine tablets for a person who, it was later discovered, was a narcotic addict and that petitioner's brother had discouraged him from selling to the person again. Beacham then told petitioner, if he could get narcotics, there was money to be made; petitioner said he would check and find out; the conversation returned to pills. Certainly, this conversation evidenced that petitioner was not then dealing in narcotics, as well as a strong reluctance to get into narcotics dealings.

Nor does petitioner's conduct thereafter indicate that, once the subject of narcotics had been broached, he displayed any willingness to go into the narcotics business; indeed, the evidence is to the contrary:

Petitioner never pursued Beacham's request; he never initiated the sale of any narcotics to any agent;

Petitioner told the agents that narcotics were dangerous to handle; that they should be careful; that a "man got 50 years" for selling narcotics; that he could deal in pills with no danger—that he could "get off just like that with no time" if he were caught selling pills;

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[31] The evidence supporting the conclusions and summarizations made herein has been detailed with record references in the "Statement of the Case," unless specifically referenced.

Petitioner was making a "lot of money" selling pills—$700 a week; he had been able to buy some land and was going to build a house on it;

Petitioner was constantly trying to sell pills to the agents; he "pressed" them to buy pills; he sought to have Rose get the people to whom he was ostensibly selling narcotics to change over to pills.

Petitioner's reluctance and unwillingness to undertake dealing in narcotics is forcefully shown by the fact that only two transactions relating to narcotics took place in the more than four months (October, 1964 - February, 1965) that the agents were trying to entice petitioner to deal in narcotics. Between October 17, 1964, and December 5, 1964, the agents either called or saw petitioner eleven times in their endeavors to get him to get narcotics for them. They had petitioner "looking all over to see if he could find some narcotics" for them; they drove around Tulsa with petitioner on three occasions trying to find "dope peddlers and Ray [petitioner] was going to help us find them." The results of these efforts: One hundred morphine tablets were purchased by Rose for $100.00 from the man on the telephone, with no profit to petitioner; and a "stash" of two sacks containing "mixed barbiturates and everything else"—most of which was "not considered good narcotics tothe addict"—which petitioner had gotten from a burglar for Rose at Rose's instigation and importuning and for which Rose paid $150.00.[32]

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[32] Petitioner's participation in these two transactions resulted in his receiving two concurrent 15 year sentences and a five-year period of probation to commence thereafter. It is submitted that neither of these transactions was a *sale* by petitioner to Rose; rather, that petitioner was *acting on behalf of* Rose, *the purchaser*. Cf., *Lambert* v. *United States*, 101 F. 2d 960 (C.A. 5, 1939). Although Lambert was found guilty of conspiracy to *sell* narcotics, the Court, on its own motion, found that his "concert was with * * * the purchaser, not with the * * * sellers" (p. 963), and reversed the case. Despite the absence of a requested instruction of this kind, this Court should notice this as plain error under Rule 52 of the Fed. R. Crim. Procedure.

From December 5, 1964, when Rose bought the burglar's "stash," until February 17, 1965, Roberts and Rose continued their efforts to prevail upon petitioner to get narcotics, but they were unsuccessful.[33]

It is respectfully submitted that the foregoing facts, which are set forth in the testimony of the Government witnesses, show clearly and unequivocally that petitioner's defense of entrapment to the narcotics charges should have been sustained as a matter of law. *The agents did not detect crime; they created it.*

CONCLUSION

For the foregoing reasons, it is respectfully prayed that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

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[33] It is of consequence that Rose did not seek a warrant to search petitioner's home when he obtained an arrest warrant for him on February 16, 1965, and that his home was never searched (R. 241-242, 249-250).

APPENDIX

APPENDIX A

(Filed Sep. 20, 1966)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1966

Number 8354

FRANCIS RAY ROBINSON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of Oklahoma

Elmore A. Page for Appellant;

Hugh V. Schaefer (John M. Imel and Lawrence A. McSoud on the brief) for Appellee.

Before LEWIS, BREITENSTEIN and HILL, United States Circuit Judges.

HILL, Circuit Judge.

Appellant was indicted on seven Counts. Counts 1 through 4 charged separate violations of 21 U.S.C. 331(k), in that he caused a number of capsules of amobarbital sodium and secobarbital sodium to be dispensed without a prescription, each dispensing being an act which misbranded the drugs; Count 5 charged the sale of 100 morphine tablets, such sale not being in pursuance of a written order, in violation of 26 U.S.C. 4705(a) and 7237(b); Count 6 charged the purchase of narcotic drugs which were not in or from the original stamped package in violation of 26

U.S.C. 4704(a) and 7237(a); and Count 7 charged a sale of 139 codeine tablets made not pursuant to a written order in violation of 26 U.S.C. 4705(a) and 7237(b). Counts 1, 2, 3 and 4 charge misdemeanors and Counts 5, 6 and 7 charge felonies. A jury returned verdicts of guilty on all Counts and sentences were imposed as follows: Count 1—one year; Count 2—one year; Count 3—one year; Count 4—one year; Count 5—fifteen years; Count 6—suspended imposition of sentence and placed on probation for five years to commence to run upon expiration of all of the other sentences; and Count 7—fifteen years with sentences on all Counts except 6 to run concurrently. This direct appeal resulted.

The record reveals that the pertinent facts leading up to the point at which appellant was charged with the crimes are as follows:

Sometime prior to September 26, 1964, Sam J. Roberts, an Inspector for the Food and Drug Administration, learned from undisclosed sources that amphetamine (a non-narcotic drug) was being sold at the "Big D" truck stop in Dallas, Texas. Roberts, on September 28, 1964, visited the truck stop. He assumed the alias of "Lee Hook" and posed as a dope peddler. An employee there furnished him with appellant's name and Roberts left his alias and phone number with the employee. On October 2, 1964, the appellant called Roberts at the Waco, Texas number he had left at the "Big D" truck stop and asked Roberts[1] how many "pills" he wanted. During this phone conversation it was agreed that Roberts and appellant would meet in Dallas in the early morning hours of the following day. Roberts then arranged with federal officials to have a surveillance team in Dallas and left immediately for that city. At approximately 2:35 a.m. on October 3,

[1] Although Roberts was, of course, at all times known to appellant as Lee Hook, he shall be referred to herein by his real name.

1964, appellant and Roberts rendezvoused at the "Big D" truck stop. At this meeting—which is the first contact the government had with him—appellant sold Roberts 125 amphetamine tablets for which Roberts paid appellant $5.00.[2] Appellant then returned to Tulsa, Oklahoma, his home.

During the period between October 3 and 17, a number of telephonic communications were had between Roberts and appellant. During one of these conversations, Roberts asked appellant if he could give a "buddy" appellant's phone number and appellant told Roberts it would be all right. Also, during these conversations—some initiated by Roberts and some by appellant—it was agreed that Roberts and appellant would meet again at the "Big D" truck stop. On October 17, 1964, this meeting took place at 8:30 p.m. Roberts was accompanied by another U.S. Food and Drug Administration Inspector, Floyd Beachum. Beachum was introduced to appellant as Willy Young, the "buddy" from Waco, Texas, referred to in the earlier phone conversation. At this meeting, Roberts purchased from appellant 5,000 benzedrine sulfate (a non-narcotic drug) tablets and paid him $195.00 therefor. Beachum also purchased some non-narcotic drugs during this Texas rendezvous. During this meeting Beachum asked appellant if he could obtain any "hard stuff". Appellant replied—so testified both Inspectors Roberts and Beachum—that he recently had obtained 25 morphine tablets for an individual.

During the next few weeks after October 17, appellant and Roberts talked to each other twice over the telephone. During one of these conversations appellant expressed an interest in selling tuinal[3] to Roberts. Roberts testified that

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[2] At no time when appellant made any of the drug sales referred to in this case was he presented with a prescription for the same by a licensed physician. See 21 U.S.C. 331(k) and 21 U.S.C. 353(b)(1).

[3] Tuinal is a non-narcotic drug. "Narcotic drugs" are those drugs so defined in 26 U.S.C. 4731.

when he asked appellant if appellant could supply him with morphine tablets, appellant replied that he had access to them and that they would cost fifty cents per tablet.

On November 11, 1964, it was agreed between appellant and Roberts that Roberts would drive to Tulsa, Oklahoma, to buy some drugs. On the following day, Roberts and Beachum drove to Tulsa and, after making a few phone calls, located appellant. Because of the Texas license plates on their car, appellant asked the agents to ride with him in his vehicle to his trailer home on the outskirts of Tulsa. Since the agents had not located appellant until late the night of the twelfth, it was 12:30 a.m. on the thirteenth before they reached appellant's home. There the agents purchased a great number of non-narcotic drugs, including 500 tuinal capsules, 500 seconal capsules, a small number of amphetamine capsules and other miscellaneous drugs. On this evening, appellant had in his home a cannister which contained straight amphetamine powder. Using some empty capsules he "capped out" a few amphetamine capsules for the agents, in order that they might see how easy it would be for them to buy the powder and make their own pills. On this morning, the agents again inquired about morphine and appellant replied he had none but expected to get some within the next few days, and that the price would be fifty cents per tablet. At about 5:00 a.m. the morning of November 13, the agents left appellant's trailer. The purchases they made on that occasion in Tulsa are the purchases charged in Counts 1 through 3 of the indictment.

On November 23, 1964, Roberts called appellant about the morphine tablets and appellant said he had some. Roberts then contacted the Bureau of Narcotics in Oklahoma City and arranged for Narcotic Agent James Rose to accompany him to Tulsa the next day. On November 24, 1964, Rose and Roberts went to Tulsa. James Rose

was introduced to appellant as a big-time dope peddler.[4] On this occasion, appellant sold to Roberts and Rose 100 morphine[5] tablets and some non-narcotic drugs. The sales made on this day are the acts alleged in Counts 4 and 5 of the indictment.

Roberts and Rose met appellant a few times after the 24th of November. Appellant, on these occasions, attempted to obtain some more morphine for the agents but was unsuccessful. However, he informed Rose and Roberts that he knew where he could obtain a great many drugs. He told them about a burglar who had been shot burglarizing a store and that this individual—who was under guard in a Tulsa hospital—had a large cache of drugs. He said he could sell the agents the drugs if he could find out where they were hidden. After some intervening meetings, Rose made a call to appellant and appellant told him he had located the cache of drugs. Rose then proceeded alone to Tulsa. On December 5, 1966, Rose purchased from appellant a great quantity[6] of narcotic drugs, including 139 codeine tablets. The possession by appellant of these 139 codeine tablets, in a package other than their original stamped package, and his sale of them to Rose are the wrongful acts alleged in Counts 6 and 7 of the indictment.

Appellant first urges that the trial court erred in not giving his requested instruction on entrapment. The instruction given by the trial court in this case conformed to what this court has said concerning the defense of en-

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[4] James Rose, of course, used an alias. Appellant knew him as Jim Adams.

[5] Morphine is a "narcotic drug" as defined by 26 U.S.C. 4731.

[6] The drugs purchased on this occasion made up some 25 exhibits at the trial.

trapment.[7] Summarizing, the jurors were told that where an accused has the readiness and willingness to commit the offense, the fact that the officers offer an opportunity to the accused to commit the offense, such as assuming fictitious identities and offering to buy narcotics from him, does not constitute entrapment. But if the accused had no previous purpose or intent to commit the offense charged and did so only because he was induced or persuaded by a government agent, then entrapment has occurred and is a good defense. Counsel for appellant cites the case of Ryles v. United States, 10 Cir., 172 F. 2d 72, to support his requested instruction. He says in his brief that in that case this court approved of the following instruction on entrapment: "If you believe from the evidence that the government agents, first suggested the commission of the crime, or did first lure the accused into the commission of such acts, then it will be your duty to hold for the defendant." This is an error on the part of counsel because no instruction on entrapment had been given in the Ryles case and the court did not approve any such instruction. The instruction on entrapment given in this case meets all of the requirements of the decided cases of this court on the subject.

Appellant points error to the reception of evidence showing the commission of crimes not charged in the indictment. This evidence pertained to the meetings at the "Big D" truck stop of Roberts and appellant on October 3 and Roberts and Beachum and appellant on October 17. The agents testified that they purchased habit-forming drugs from Robinson on both occasions. According to the record this evidence was admitted to show a common scheme, plan or design and, in addition insofar as Counts 5, 6 and 7, to show the accused's state of mind and intent. During the

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[7] See Lucas v. United States, 10 Cir., 355 F.2d 245; Jordan v. United States, 10 Cir., 348 F.2d 433; Maestas v. United States, 10 Cir., 341 F.2d 493.

trial and by a jury instruction, the court so advised the jury. Of course, the general rule is that evidence of another and independent crime is not admissible against an accused; but a recognized exception to that rule is that evidence of other crimes committed by an accused is admissible if such evidence tends to establish a common scheme, system, plan or design on the part of the accused, where it is so related to the crime charged, that it may serve to establish the crime charged or to establish an intent or a motive in the mind of the accused to commit the crime charged.[8] Certainly, all of the crimes charged and the other crimes shown by the questioned evidence were crimes of a similar nature, that is, crimes involving traffic in illegal drugs. This evidence did tend to establish a common scheme, plan and design on the part of the accused and was related to the crimes charged. It did give the jury additional evidence from which it could find intent as to Counts 5, 6 and 7 and ascertain the state of mind of the accused. The fact that the other crimes established did not require the element of intent does not change their admissibility.

Appellant attacks the indictment in several particulars. First, he says there was a misjoinder of offenses charged because the first four Counts charge misdemeanors and the last three charge felonies, the first group not requiring proof of the element of intent and the last group containing that element of proof. He claims prejudice because of such joinder. The record does not show any objection to the indictment prior to trial exactly on this ground. There was a motion filed to dismiss three of the first four Counts. But the motion was made because appellant felt the government was moulding three crimes out of a single act. The motion was denied. At the close of the government's evidence appellant moved to declare a mistrial on this ground of misjoinder and the resulting prejudice to the

[8] Morgan v. United States, 10 Cir., 355 F.2d 43.

accused. We do not believe there was a misjoinder of offenses in the indictment. Such a joinder is plainly authorized by Rule 8, F.R. Crim. P.[9] The offenses were of a similar character, all pertaining to the unlawful traffic in habit forming and contraband drugs, they were all based on a series of connected transactions and when considered together tend to establish a common scheme or plan. Admittedly, the method followed by the government in joining the seven offenses in one indictment was damaging to the accused because of the wide scope of evidentiary inquiry permitted but we are unable to conclude that it was prejudicial to him in the sense that it amounted to a prejudicial misjoinder under Rule 14, F.R. Crim. P. Had the accused been charged by seven separate indictments and given seven separate trials, most of the evidence adduced in the trial in question would have been admissible in each of the separate trials.

Appellant contends the trial court erred in denying his motion to dismiss Counts 2 and 3, in which motion it was contended that Counts 1, 2 and 3, because the acts charged occurred on the same evening and at the same place, constituted but one offense. Little need be said about this contention. In Beacham v. United States, 10 Cir., 218 F. 2d 528, 529, Judge Murrah said, "The traditional test of the identity of offenses is 'whether the same evidence is required to sustain them' * * *." Applying this test to the offenses charged in Counts 1, 2 and 3, we must conclude they were separate offenses. Appellant relies on Robinson v. United States, 10 Cir., 143 F. 2d 276. The court there used the same test, but from the facts of that

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[9] "Rule 8, Joinder of Offenses and of Defendants.

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

case, came to a different conclusion than we reach on the facts of the case at bar. The facts here show that each of the sales charged in the three Counts were separate transactions despite the fact that they occurred at the same place and were very close in point of time. It should also be noted that since the sentences imposed on Counts 1, 2 and 3 are to run concurrently, there can be no prejudice to appellant in any event.

Error is also urged because of the admission of evidence which we have not separately covered. We have considered the record in connection with this evidence and find the urged errors to be without merit. Complaint is also made concerning the final argument of government counsel and of statements made by that counsel during the trial. These alleged objectionable statements are not specifically pointed out to us and the record of the closing argument was not brought up by appellant.

We have very carefully read and considered the entire record before us in the case and find that there is no substantial trial error and that appellant was afforded a fair trial in all respects.

AFFIRMED.

Judgment

Seventh Day, September Term, Tuesday, September 20th, 1966.

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said

district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Francis Ray Robinson, appellant, surrender himself to the custody of the United States Marshal for the Northern District of Oklahoma in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

[On October 3, 1966, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.]

APPENDIX B

Defendant's Requested Instruction

Ladies and Gentlemen of the Jury:

You are further instructed that the defendant has interposed as one of his defenses, to Counts five, six and seven (5, 6 & 7) of the indictment, the defense of Entrapment. And in this connection, you are instructed that if you believe from the evidence that the Government's agents, or those acting under them, first suggested the commission of the criminal act, or did first lure the accused into the commission of such acts, then and in that event, it will be your duty to hold for the defendant and acquit him on such Counts 5, 6 and 7.

However, if you believe from the evidence that the first suggestion for the commission of the crime came from the defendant and that all of the essential acts constituting the crime were done by him, then the fact that the Government's agents, or those acting under them, furnished an opportunity and gave aid in the commission of the offense less than the performing of some essential act constituting the offense, then and in such event, the defense of entrapment would not apply.

Respectfully submitted by:

ELMORE A. PAGE,
Attorney for Defendant.

Approved: ; Denied: Because court's instructions adequately covered this subject.

ALLEN E. BARROW

Criminal Jury Instructions for the District of Columbia

ENTRAPMENT

Evidence has been introduced that law enforcement officials induced *the unlawful conduct with which the defendant is charged.*

If an official of the Government, either acting directly or through an agent, induces an otherwise unwilling person to commit an unlawful act and the person would not have committed the act but for this inducement, that person is not criminally responsible for the act.

On the other hand, if the Government did not induce the conduct, because the defendant was predisposed or ready to commit *the* offense and was merely afforded an opportunity by the Government to do so, he may be found guilty, provided that the Government has proved all essential elements of the offense beyond a reasonable doubt.

The Government must prove beyond a reasonable doubt that the defendant was not induced to commit *the unlawful conduct with which he is charged,* because he was merely afforded an opportunity to commit the offense, being predisposed or ready to do so.

Inducement may take different forms, such as persuasion, fraudulent representations, threats or other coercive tactics, or holding out the promise or hope of reward. However, law enforcement officials are not precluded from utilizing artifice and stratagem, such as the use of decoys or undercover agents, to apprehend a person engaged in a criminal enterprise, provided that they merely afford opportunities or facilities for the commission of an offense by one already predisposed or ready to commit it.

It is for you to determine on the basis of all the evidence whether the Government has proved beyond a reasonable doubt that it did not induce the defendant *to commit the*

offense with which he is charged. If you have a reasonable doubt whether or not the defendant was induced to commit *the* offense by the activity of law enforcement officials of the Government, or their agents, you must find him not guilty.

In determining this question, you may *consider* evidence of the prior conduct of the defendant, including his criminal record, if any, and prior offenses of similar character he may have committed, if any. You may consider such evidence, however, *solely* in connection with your *determination of his predisposition or readiness to commit the offense with which he is now charged.* It is not evidence that he actually committed the *offense* with which he is now charged. Moreover, the fact, if it is a fact, that the defendant may have a criminal record or may have committed prior offenses of similar character does *not require you to conclude* that he had the predisposition or readiness to commit the offense with which he is now charged. (Emphasis supplied)

Mathes and Devitt, Federal Jury Practice and Instructions—Civil and Criminal

§ 10.12 "UNLAWFUL ENTRAPMENT"—DEFINED

The accused offers the defense of unlawful entrapment as to the crime charged in the indictment.

The law recognizes two kinds of entrapment: unlawful entrapment and lawful entrapment. Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is no defense, but is a lawful entrapment. When, for example, the Government has reasonable grounds for believing that a person is engaged in the illicit sale of narcotics, it is not unlawful entrapment for a Government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes such as charged in the indictment, whenever opportunity was offered, and that the Government agents did no more than offer the opportunity, the accused is not entitled to the defense of unlawful entrapment.

On the other hand, if the jury should find from the evidence in the case that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the defense of unlawful entrapment is a good defense, and the jury should acquit the accused.

Manual On Uniform Instructions in Federal Criminal Cases (7th Circuit)

5.02—ENTRAPMENT

The defendant has interposed the defense of entrapment. To constitute a defense the entrapment must be unlawful. Unlawful entrapment means that the idea of committing the crime originated with the law enforcement officers or their agents rather than with the defendant, that he had no previous disposition to violate the law, and that they urged and induced him to commit the crime charged.

The defense is based on the policy of the law not to ensnare or entrap innocent persons into the commission of a crime.

The defense of unlawful entrapment is not established if the defendant was either engaged in similar crimes or was ready and willing to violate the law, and law enforcement officers or their agents merely afforded him the opportunity of committing the crime. Under these circumstances, entrapment is lawful rather than unlawful, even though the law officers may have used a ruse or otherwise concealed their identity.

APPENDIX C

Instruction Concerning Evidence of Texas Sales of Pills

"You are instructed that although the defendant is charged with sale of habit forming drugs and possession and sale of narcotics in the Northern District of Oklahoma, the Court, nevertheless, permitted evidence of like or similar transactions for other periods in Texas, which are not covered by the indictment.

"The fact that the accused may have committed an offense at some other time is not evidence of proof that, at a later time, the accused committed the offense charged in the indictment. Evidence as to an alleged earlier offense of a like nature may not therefore be considered by the Jury in determining whether the accused did the act charged in the indictment.

"Such evidence is to be considered by you only as you may find it bears upon or relates to the state of mind of the defendant, if you find beyond a reasonable doubt that the defendant committed the acts charged in the indictment.

"In other words, such evidence was admitted for the purpose of throwing light upon the state of mind of the defendant, and to show that the alleged earlier offense was part of a pattern, or course of conduct, which had been followed during other periods."

APPENDIX D

FEDERAL STATUTES:

21 U.S.C. 331. Prohibited acts

The following acts and the causing thereof are prohibited:

* * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

21 U.S.C. 333. Penalties—Violation of Section 331 of this title

(a) Any person who violates any of the provisions of Section 331 of this title shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not *more* than one year, or a fine of not more than *$1,000,* or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

21 U.S.C. 353. Exemptions in case of drugs and devices—Regulations for goods to be processed, labeled, or repacked elsewhere

* * *

(b) (1) A drug intended for use by man which—

(A) is a habit-forming drug to which section 352(d) of this title applies; * * * shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon

an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

26 U.S.C. 4704(a) General Requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

26 U.S.C. 4705(a) General Requirement.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. 7237(a) Where No Specific Penalty Is Otherwise Provided.—Whoever commits an offense, or conspires to commit an offense, described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a third or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

26 U.S.C. 7237(b) Sale or Other Transfer Without Written Order.—Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000. If the offender attained the age of 18 before the offense and—

(1) the offense consisted of the sale, barter, exchange, giving away, or transfer of any narcotic drug or marihuana to a person who had not attained the age of 18 at the time of such offense or

(2) the offense consisted of a conspiracy to commit an offense described in paragraph (1),

the offender shall be imprisoned not less than 10 or more than 40 years, and in addition, may be fined not more than $20,000.

FEDERAL RULES OF CRIMINAL PROCEDURE:

8(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

14. *Relief from Prejudicial Joinder.*—If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severence of defendants or provide whatever other relief justice requires.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 784

FRANCIS RAY ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 366 F. 2d 575.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1966. Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including November 19, 1966, and on November 18, 1966, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established entrapment as a matter of law.

2. Whether the trial court's instructions as to entrapment were erroneous.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Oklahoma, petitioner was convicted on four counts (Counts 1–4) of an indictment charging the dispensing of habit-forming drugs without a prescription in violation of the Federal Food, Drug, and Cosmetic Act (See 21 U.S.C. 331(k), 353(b)(1)) and on three counts (Counts 5–7) charging the sale and purchase of narcotic drugs in violation of 26 U.S.C. 4704(a), 4705(a). He was sentenced to imprisonment for one year on each of the first four counts, and fifteen years on Counts 5 and 7, the terms to run concurrently. Sentence on Count 6 was suspended, and probation for five years was imposed. On appeal the conviction was affirmed.

The government's evidence showed that, in September 1964, Federal Food and Drug Inspector Roberts, who was investigating in an undercover capacity the sale of amphetamine at a Dallas, Texas, truck stop, was referred to petitioner. On October 2, petitioner called from his home in Tulsa, Oklahoma, to the agent in Waco and arranged for an early morning meeting at the Dallas truck stop. At this time he sold the agent a quantity of amphetamine tablets and expressed a desire to "take care" of him in the future (R. 16–25).

Thereafter, frequent telephonic communications took place between Inspector Roberts and petitioner, and they culminated in another meeting at the Dallas truck stop on October 17. At that time Roberts, with petitioner's consent, brought along Food and Drug Inspector Beacham, who was represented to be another drug peddler (R. 26–27). At this meeting both inspectors purchased non-narcotic drugs and discussed with petitioner prices and the availability of additional supplies (R. 27–29; 159–163). Petitioner said that he could get "anything" because his brother was a doctor (R. 160). Thereupon Beacham asked if petitioner could get "hard stuff". Petitioner replied that he had recently obtained 25 morphine tablets for an individual who "later on was found out to be an addict" and that his brother would not thereafter permit him to sell to that individual (R. 28). Beacham observed that good money could be made by dispensing morphine tablets in the Waco area, and petitioner replied that he "would check with his man and see what could be done" (R. 28).

In a subsequent telephone conversation on October 28, Inspector Roberts asked if petitioner had morphine tablets. Petitioner answered that he had access to them and that the price would approximate fifty cents per tablet (R. 31).

Following telephone calls by petitioner and Roberts on November 11, the two inspectors drove to Tulsa, where petitioner met them and drove them in his own car to his trailer house. There he pro-

duced many habit-forming drugs (such as tuinal, seconal, amphetamine powder and liquid) and repeatedly urged the inspectors to sample or buy them. The inspectors' purchases on that occasion formed the basis for the charges in Counts 1–3 (R. 31–43; 167–171). At this time Roberts asked whether petitioner had checked on the morphine. Petitioner answered that he would have some in the next two or three days and again quoted the price. Roberts said that he would check back with petitioner (R. 44, 171).

A few days later, petitioner told Roberts on the telephone (pursuant to Roberts' call) that he had checked with his "man", and that if he was going to handle the morphine tablets, it would be in a large quantity at one time. He quoted the price as $550 for 1,000 tablets and told Roberts he would probably have them on the following day (R. 45).

Roberts failed to call petitioner on the following day. When he called later, petitioner chided him for not calling as he had promised. Petitioner said that he had sold the morphine to another customer. Roberts said his man in San Antonio wanted a sample and petitioner promised that he would obtain a sample of ten or twelve tablets for Roberts. When Roberts called on November 23, petitioner indicated that he had the narcotics. Thereupon Roberts called the Federal Bureau of Narcotics and arranged to have a narcotic agent accompany him on a trip to petitioner's Tulsa home (R. 45–47).

On November 24, Inspector Roberts and Federal Narcotic Agent Rose drove to Tulsa where Roberts

introduced Rose to petitioner as his "boy" from San Antonio who handled "hard stuff" (R. 47, 191). Petitioner, after again chiding Roberts for not calling after placing an order, produced a bottle of 100 morphine sulfate tablets from which he said he would sell ten or twelve as a sample. Rose indicated that he would prefer to take the entire bottle in view of the distance he had traveled. After making a telephone call, petitioner sold the bottle to Rose for $100 (R. 48–49; 193–194). This was the basis for Count 5. In addition, the agents, at petitioner's urging, bought non-narcotic drugs (R. 52–53; 199).

At this meeting, petitioner talked about the danger of dealing in narcotic drugs and his preference for dealing in "pills". He said, however, that he had sold "many a bottle [narcotic drugs] for $200.00" (R. 194–195). He said that he knew addicts who would pay $5.00 a tablet—no questions asked—but that he did not deal with addicts or street peddlers. He said he was strictly a wholesale dealer whose supply was obtained through the manipulation of records of legitimate sources (R. 49; 192–193; 197).

In late November and early December, petitioner, in the presence of the agents, tried unsuccessfully to obtain a larger quantity of morphine (see R. 53–57; 201–204). He told the agents that he was having a difficult time, but that he knew of a burglar under guard at a hospital whose hidden cache of drugs could be obtained through the man's wife (R. 202). On December 4, petitioner indicated that he had been successful in locating the cache, and that it contained,

among other items, opium, morphine, and codeine (R. 206). Agent Rose drove to Tulsa and purchased from petitioner a quantity of drugs including the 139 codeine tablets which were the subjects of Counts 6 and 7 (R. 206–216).

Petitioner produced the testimony of a friend who said that in November 1964 he overheard petitioner tell agents Roberts and Rose that he could not find narcotics and that, while he did not know narcotics when he saw it, there might be some in the proceeds of a burglary which he thought he could obtain for them if they wanted it (R. 277, 279, 282). The friend said that the agents also asked him to try to locate narcotics for them and pressed him to do so in subsequent meetings and long-distance telephone calls (R. 278–280). Petitioner's wife testified that the agents "kept after" her husband to procure "hard stuff" (R. 289). She said that petitioner made no profit from the narcotics which a person had left at the trailer for him to sell, and that he thought he was doing the agents a favor (R. 293).

2. At the close of the government's case, petitioner moved to dismiss the narcotics counts on grounds of misjoinder and all counts on the ground that he was "legally entrapped" (R. 272). The motions were overruled. At the close of the whole case, after having offered the testimony referred to above, he unsuccessfully moved to dismiss the narcotics counts on the ground that the evidence showed entrapment as a

matter of law (R. 295). The judge gave a charge on entrapment as follows (R. 301–302):

> The accused offers the defense of unlawful entrapment as to the crime charged in the indictment.
>
> The law recognizes two kinds of entrapment; unlawful entrapment and lawful entrapment. Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law, as a matter of policy, forbids a conviction in such a case.
>
> On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that Government Agents provide what appears to be a favorable grounds for believing that a person is engaged in the illicit sale of narcotics, it is not unlawful entrapment for a Government Agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.
>
> If, then, the Jury should find that beyond a reasonable doubt from the evidence in the case, that before anything at all occurred respecting the alleged offense involved in this case, the accused was ready and willing to commit crimes, such as charged in the indictment, whenever opportunity was offered, and that the Government Agents did no more than offer the opportunity, the accused is not entitled to the defense of unlawful entrapment.
>
> On the other hand, if the Jury should find from the evidence in the case that the accused

> had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government then the defense of unlawful entrapment is a good defense, and the Jury should acquit the accused.

He also instructed the jury that each count of the indictment charged a separate offense and that the jury should consider the evidence applicable to each count separately. The judge said R. 303):

> * * * The fact that you may find the defendant guilty or not guilty of one of the crimes or offenses charged should not control your verdict with reference to any of the other crimes or offenses charged.

ARGUMENT

1. Petitioner concedes that the evidence clearly established that he was "ready and willing" to sell non-narcotic habit-forming drugs without a prescription (Pet. 18). He argues, however, that the evidence established entrapment as a matter of law with respect to the sale of the narcotic drugs. The test of entrapment, however, is whether the criminal design originated with government officials who implanted in the mind of an innocent person a disposition to commit the offense or whether such agents merely afforded the opportunity for the commission of the offense. See *Sorrells* v. *United States,* 287 U.S. 435; *Sherman* v. *United States,* 356 U.S. 369; *Lopez* v. *United States,* 373 U.S. 427; *Osborn* v. *United States,* No. 29, this Term, decided December 12, 1966.

Here it was only after petitioner boasted that his "sources" could supply "anything" that the agents mentioned narcotic drugs. Petitioner immediately expressed willingness to ascertain whether such drugs were available, stating that he had previously made a sale to an addict and that his source of supply did not approve. The government's evidence revealed no hesitancy on his part thereafter in his attempts to supply morphine for resale to individuals who masqueraded as drug peddlers. His occasional cautionary remarks did not show lack of predisposition. And the fact that he was willing to violate the law with respect to the sale of non-narcotic drugs was, at least, some evidence of predisposition to sell narcotic drugs as well.

These circumstances do not establish entrapment as a matter of law. See *Masciale* v. *United States*, 356 U.S. 386, where the defendant had not been shown to have previously engaged in the narcotics business but embraced the opportunity to do so as soon as it was presented to him. In this case, not only did petitioner indicate that he could supply "anything", but he immediately set about trying to locate a supply when narcotics were mentioned. The issue of entrapment was, therefore, properly presented to the jury.

2. The instructions on entrapment were not made erroneous by the reference to "lawful" and "unlawful" entrapment. As petitioner notes (Pet. 14–16), the instruction given here has been approved in various manuals, but was criticized by the Court of Appeals for the Second Circuit in *United States* v. *Pugliese*,

346 F. 2d 861 (C.A. 2). We believe, however, that the instruction adequately conveyed to the jury the factual determination on which the entrapment defense rested. It distinguished, in plain and understandable terms, between "the trap for the unwary innocent and the trap for the unwary criminal" (see *Sherman* v. *United States*, 356 U.S. 369, 372). The reference to "lawful entrapment" did not invalidate the instruction. See *United States* v. *Laverick*, 348 F. 2d 708 (C.A. 3), certiorari denied, 382 U.S. 940; *Cross* v. *United States*, 347 F. 2d 327 (C.A. 8).

Nor is there any substance to petitioner's claim that the instructions *required* the jury to reject the entrapment defense as to the narcotics charges if it found that petitioner had a predisposition to sell non-narcotic drugs (Pet. 17–21). Petitioner's readiness to sell other habit-forming drugs in violation of federal law was, of course, *some* evidence of his readiness to sell narcotics. The instructions to the jury did no more, we submit, than permit the jury to consider that evidence in determining whether petitioner was entrapped; they did not require a rejection of the defense if the jury was satisfied that non-narcotic drugs had been sold. Petitioner reads that portion of the instruction which advised the jury that he was not entitled to the defense of entrapment if he "was ready and willing to commit crimes, such as charged in the indictment * * *" (p. 7, *supra*) as meaning that a disposition to commit *any* of the crimes enumerated in the indictment would require rejection of the entrapment claim as to *all* counts.

A full reading of the charge, and particularly of the instruction to consider each count separately, demonstrates that the jury could not have been confused in this manner. It was clear to the jury that the entrapment defense could be rejected on the grounds of predisposition as to any count only if there was adequate proof that petitioner was "ready and willing to commit" the offense charged in *that* count. In any event, the particular ambiguity now being pressed by petitioner was not specified to the district judge; the mere fact that petitioner offered an alternate instruction, which was defective for other reasons,[1] did not preserve the narrow and hardly obvious ambiguity as a ground for appeal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

DECEMBER 1966.

[1] Petitioner's instruction would have required a judgment of acquittal on entrapment grounds if the jury was satisfied that a federal agent was the first to mention the possible purchase of narcotic drugs. That is not the law. See *Masciale v. United States*, 356 U.S. 386.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 784

FRANCIS RAY ROBINSON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

REPLY OF PETITIONER TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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REPLY OF PETITIONER TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

In its effort to persuade this Court to deny the petition filed herein and thereby sustain the conviction of petitioner for selling narcotics,[1] the Brief of the United States in Opposition finds it acceptable justice that an instruction on entrapment which has been specifically rejected by the Second Circuit as "invit[ing] needless confusion" serves—and will continue to serve—as the guide for juries in other circuits, makes no

[1] Petitioner was sentenced to a term of fifteen years.

effort to defend a prejudicially erroneous instruction, but argues that it was cured by other portions of the charge and that, "in any event," the point was not "specified" to the trial court, and incompletely summarizes the evidence relevant to the issue of petitioner's "predisposition" to deal in narcotics. In view of the foregoing, it is necessary to submit this reply to the Government's brief.

I

We submit that this petition should be granted because there is a conflict between Courts of Appeals concerning a matter of great importance in the trial of offenses that are being prosecuted with growing frequency. The need for clarity of instruction with respect to entrapment cannot be overemphasized in view of the efforts being made today to enforce the narcotics laws.

In *Pugliese* v. *United States*, 346 F. 2d 861 (C.A. 2, 1965), the Court of Appeals for the Second Circuit rejected the same instruction on entrapment as was given in the instant case because it "invite[s] needless confusion."[2] The continued use of this instruction in other circuits is certain because it has been approved by other Courts of Appeals[3] and because it is found in two manuals that enjoy wide acceptance by trial judges.[4] These facts are acknowledged in the brief in

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[2] Pet. 14-15.

[3] *United States* v. *Laverick*, 348 F.2d 708 (C.A. 3, 1965); *Cross* v. *United States*, 347 F.2d 327 (C.A. 8, 1965), wherein the Court explained at length why the use of "lawful entrapment" and "unlawful entrapment" was not confusing.

[4] Pet. 16-17.

opposition. Nevertheless, instead of joining to request that this conflict between Courts of Appeals be resolved, the Government asks that the petition be denied. It does so because it is of the opinion that such instruction was "adequate" (G. Br. 10).

We respectfully submit that, when a Court of Appeals has expressed its opinion that such instruction "invite[s] needless confusion" and when it is clear that such instruction will continue to be used by trial judges in at least those circuits in which it has been approved, uniformity of instruction on this critical phase of defense among the several circuits requires that this Court resolve the conflict.

II

The Government does not appear to challenge petitioner's complaint that the instruction on entrapment *required* the jury to reject petitioner's defense of entrapment to the *narcotics* charges if it found that petitioner had a predisposition to sell *non-narcotic* pills. Nor does the Government seem to defend such instruction as being a proper one. It argues, instead, that such complaint is without "substance" because a "full reading of the charge, and particularly of the instruction to consider each count separately, demonstrates that the jury could not have been confused in this manner" (G. Br. 10). In short, the Government argues that the error complained of was cured.

The specific instruction relied upon to cure the error complained of reads:

> "You are advised that a separate crime or offense is charged in each of the counts contained in the indictment herein. Each crime or offense as

> charged and the evidence applicable thereto should be considered separately. The fact that you may find the defendant guilty or not guilty of one of the crimes or offenses charged should not control your verdict with reference to any of the other crimes or offenses charged." (R. 303)

Such charge did not and could not cure the error complained of. Granted that the jury was instructed to consider each crime separately and that its finding with respect to one crime should not control its findings as to the others, the critical fact remains that, in its *separate* consideration of each crime, the jury was following an instruction which advised it that the defense of entrapment could not prevail as to the particular crime it was then considering if it found that the petitioner was "ready and willing to commit crimes, such as charged in the indictment, * * *."[5] Thus, in its separate consideration of each of the narcotics charges, the jury was proceeding under the clear admonition that petitioner was not entitled to the defense of entrapment if it found that petitioner was "ready and willing" to sell pills.[6] The instruction that each crime be considered separately could not cure the instruction complained of.[7]

As for the Government's position that the complaint here pursued was not brought to the trial court's at-

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[5] This advice was also stated in the following manner: "* * * if the jury should find * * * that the accused had no previous intent to commit *any* offense of the character *here charged* * * *" the jury should acquit the petitioner (R. 302, emphasis supplied).

[6] Such instruction is, we submitted, in conflict with *Hansford* v. *United States*, 303 F.2d 219, 112 U.S. App. D.C. 359 (1962). (Pet. 17-21)

[7] It is to be noted, also, that the jury asked for, and received, a written copy of the instruction on entrapment (R. 310-311).

tention, it is to be noted that the instruction which was requested but denied specifically provided that the defense of entrapment was being raised only to the narcotics charges and, accordingly, directed the jury's attention to the petitioner's and the Government agents' actions with respect thereto (App., p. 11a). Moreover, petitioner had objected to the admission of the evidence relating to the sales of pills in Texas for the purpose of showing intent and to show a course of conduct on the ground that a sale of pills is in no way connected with a sale of narcotics and that "this testimony would prejudice him with respect to Counts Five, Six and Seven (narcotics)" (R. 22-24). Petitioner also objected to the Court's instruction concerning the purpose of such evidence (R. 307).

III

The Government's summarization of the evidence relating to petitioner's defense of entrapment is so capsuled that it glosses over facts of critical importance, thereby resulting in the assertion of two material conclusions, each of which is contrary to the facts.

The Government states that the inspector's initial inquiry of petitioner concerning petitioner's ability to obtain narcotics came about because petitioner "boasted" he could get "anything" (G. Br. 9), thus implying that petitioner was the one who first suggested the possibility of obtaining narcotics for the inspectors. The fact is that the inspector and petitioner were then talking about petitioner's ability to obtain "amphetamine powder, the raw stuff" (from which pills are made), so the inspector and petitioner could "'go in business and punch out our own pills'" (R. 160). The

context makes it perfectly clear petitioner was not referring to narcotics when he said he could get "anything."

The Government twice uses the word, "immediately," in its effort to make it appear that petitioner did not hesitate to avail himself of the "opportunity" afforded him by the inspectors to obtain narcotics for them (G. Br. 9). "Immediately" is the antithesis of the fact: It was only after *five weeks* of importuning by the inspectors—four long distance telephone calls and a personal visit—that petitioner produced any narcotics (Pet. 5-7).[8]

The detailed recitation of the facts set forth in the petition[9] establishes that it was the agents of the Government who first suggested that petitioner obtain narcotics for them and who, thereafter, by entreaty and appeal, induced and persuaded petitioner to obtain narcotics for them.

CONCLUSION

For the reasons stated in the petition and in this reply, we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[8] Petitioner then acted only as the middleman between the agent and the person to whom the narcotics belonged (Pet. 7).

[9] Pet. 2-11. Such a recitation was required because of the very nature of the defense of entrapment.